CALIFORNIA OFFICE OF ADMINISTRATIVE LAW

SACRAMENTO, CALIFORNIA

In re: Request for Regulatory Determination filed by Richard J. Simmons, Esq. of Musick, Peeler & Garrett, concerning the Department of Industrial Relations, Division of Labor Standards Enforcement's "Policy and Procedure Memo 82-5" (guidelines for distribution of service charges)[1]	1989 OAL Determination No. 17 [Docket No. 89-005] December 29, 1989 Determination Pursuant to Government Code Section 11347.5; Title 1, California Code of Regulations, Chapter 1, Article 2

Determination by:

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SYNOPSIS

The issue presented to the Office of Administrative Law is whether or not a memorandum issued by the Department of Industrial Relations, Division of Labor Standards Enforcement, which sets guidelines for the distribution of service charges to employees, is a "regulation" required to be adopted in compliance with the Administrative Procedure Act.

The Office of Administrative Law has concluded that the memorandum is a "regulation" required to be adopted in compliance with the Administrative Procedure Act.

THE ISSUE PRESENTED [2]

The Office of Administrative Law ("OAL") has been requested[3] to determine[4] whether or not the Department of Industrial Relations, Division of Labor Standards Enforcement's ("DLSE") "Policy and Procedure Memo 82-5" ("Memo 82-5") is a "regulation" required to be adopted pursuant to the Administrative Procedure Act.[5]

THE DECISION [6,7,8,9,10]

OAL finds that (1) rules issued by DLSE are generally required to be adopted pursuant to the Administrative Procedure Act ("APA"); (2) DLSE's Memo 82-5 is a "regulation" as defined in Government Code section 11342, subdivision (b); (3) Memo 82-5 is not exempt from the requirements of the APA; and (4) therefore, Memo 82-5 violates Government Code section 11347.5, subdivision (a).

REASONS FOR DECISION

I. AGENCY; AUTHORITY; BACKGROUND

Agency

The Division of Labor Standards Enforcement (a division of the California Department of Industrial Relations) was created in 1976 by the enactment of Labor Code sections 82 and 83.[11] The California Labor Commissioner is Chief of the Division of Labor Standards and Enforcement ("DLSE").[12]

DLSE is responsible for enforcing various provisions of the California Labor Code, including those involving wages, hours, and working conditions.[13]

Authority [14]

Due to the complexity of the organization of the Department of Industrial Relations, the extent of DLSE's rulemaking power is not readily apparent.[15] As this matter comes before us solely in the context of a request for regulatory determination, however, we need not reach any definitive conclusions with respect to the issue of "authority." (See note 14 for additional discussion.)

Background

To facilitate better understanding of the issues presented in this determination, we set forth the following relevant statutes and undisputed facts.

In 1937, the California Legislature enacted Article 1 (sections 350 through 356) of Division 2, Part 1, Chapter 3, of the Labor Code.[16] The article concerns the subject of "Gratuities."

Labor Code section 350, subdivision (e), defines "gratuity" as follows:

> "'Gratuity' includes any tip, gratuity, money, or part thereof, which has been paid or given to or left for an employee by a patron of a business over and above the actual amount due such business for services rendered or for goods, food, drink, or articles sold or served to such patron." [Emphasis added.]

Labor Code section 351, last amended in 1975,[17] states:

"No employer or agent shall collect, take, or receive any gratuity or a part thereof, paid, given to or left for an employee by a patron, or deduct any amount from wages due an employee on account of such gratuity, or require an employee to credit the amount, or any part thereof, of such gratuity against and as a part of the wages due the employee from the employer. Every such gratuity is hereby declared to be the sole property of the employee or employees to whom it was paid, given, or left for. This section shall not apply to any employment in which no charge is made to a patron for services rendered to the patron by an employee on behalf of his employer if both of the following conditions are met: (a) the employee is receiving a wage or salary not less than the higher of the state or federal minimum wage, regardless of whether such employee is subject to either such minimum wage law, and (b) the employee's wage or salary is guaranteed and paid in full irrespective of the amount of tips received by the employee." [Emphasis added.]

On November 29, 1982, former State Labor Commissioner Patrick W. Henning issued a memorandum on the subject "Service Charges: Policy" (referred to by both DLSE and the Requester as "Policy and Procedure Memo 82-5" ("Memo 82-5" or "challenged rule")). Memo 82-5 states:[18]

"To clarify the treatment to be accorded service charges and similar payments made by patrons ('service charges'), including payments 'in lieu of tips' pursuant to the provisions of Labor Code Sections 350, et. seq., relating to 'gratuities' the policy of the Division with respect to service charges will be as follows:

"1. Such service charges shall be distributed only to (a) those employees who are actually involved in the service of the function in question (whether before, during, or after the function, and whether such service involves the setting up of the necessary facilities, the preparation of food and beverages, or the bussing and clean-up and washing required after the function); and (b) those individuals whose work for the establishment generally is directly and primarily related to the selling, planning, or arranging of such functions; provided, however, that in no event shall the portion of the service charge distributed to employees in category (a), above, be less than 75% of the applicable service charge except in those instances where the establishment discloses in general terms to the patron the manner in which such service charge will be distributed to employees. As used herein, 'patron' does not

refer to each person who attends a function at the establishment but refers only to the person primarily responsible for arranging the function with the establishment.

In no event shall participation in any part of the service charge be allowed to anyone having greater than 5% ownership or proprietary interest in the establishment.

"2. Except as otherwise provided in this Policy and Procedure Memo, failure of an establishment to comply with the provision of Section 1, above, shall result in a rebuttable presumption that the service charge in question is a gratuity as defined in Labor Code Section 350 and should be treated accordingly.

"3. It shall not be deemed a violation of Labor Code Sections 350, et seq., for the employer to withhold from such service charges amounts required to be withheld or contributed therefrom for purposes of federal or California income taxation, California Disability Income taxation, California Unemployment Insurance taxation, Federal Income Contribution Act taxation, or other federal, California, or local taxation requirements as may be applicable from time to time to such service charges. Moreover, the amount of such service charge actually paid to any employee shall not be deemed to constitute part of any such employee's regular rate of pay for purposes of computing any overtime compensation that might be due.

"4. (a) Sections 1 and 2, above, shall not apply to a service charge (however denominated) where the distribution of such service charge is specified in a valid collective bargaining contract or agreement.

(b) Where a valid collective bargaining agreement is in effect and is silent with regard to the distribution of service charges, the existing labor-management practice as to the distribution of service charges shall prevail.

"5. Sections 1 and 2, above, shall not apply with respect to any employee (1) whose regular rate of pay, exclusive of any gratuities, is at least one and three-quarters (1 3/4) times the then-current minimum wage applicable to such employee, and (2) who has received from his/her employer written

notice that the employee's regular rate of pay is in lieu of any portion of such service charge.

"6. This is a restatement of our Policy and is effective as of July 15, 1982."

[Emphasis added.]

On February 28, 1989, Richard J. Simmons, an attorney with the law firm of Musick, Peeler & Garrett filed a Request for Determination with OAL, alleging that Memo 82-5 is a "regulation" within the meaning of the APA, was not issued in accordance with the requirements of the APA and is thus invalid and unenforceable.

Following OAL's acceptance of the Request for Determination, Lloyd W. Aubry, Jr., then State Labor Commissioner, issued "Management Memo 89-2" ("Memo 89-2"), dated June 9, 1989, which superseded Memo 82-5.[19] Memo 89-2 stated in part:

"[A] . . . request [for Determination] has been filed with regard to Policy & Procedure Memo 82-5, which governs the treatment of service charges. This issue normally arises in the banquet setting when a mandatory service charge is added to the cost of the meals and is part of the full price of putting on the function. Policy & Procedure Memo 82-5 sets forth a distribution schedule which permits a certain portion of service charges to be distributed to persons who actually served the meals (75%) and another portion (25%) to be distributed to those involved in administrative functions related to selling, planning, and/or arranging the particular event. . . . The policy also states that the service charges are not to be considered part of the employee's regular rate of pay for purposes of computing overtime. Finally, the memo states that 75%-25% does not apply to those employees making 1 3/4 times the minimum wage.

"This policy was a dramatic departure from previous Division policy. The previous policy within the Division provided that service charges were not gratuities but were part of the gross receipts of the employer and could be used in any fashion by the employer, including payment of wages. As former Labor Commissioner [James L.] Quillin stated in Policy & Procedure Memo 76-1:

'Compulsory service charges imposed on customers are not tips, but are part of the employer's gross receipts. As such, they also are subject to sales tax. Compulsory service charges are thus treated the same as banquet tips, which, under Internal

> Revenue rulings are always service charges rather than tips. When such service charges, or portion thereof, are paid over to employees, they are wages subject to all payment of taxes.'

"Accordingly, under Policy & Procedure Memo 76-1 service charges which were paid to employees as part of their wages could be used to satisfy the minimum wage obligation; however, they were also required to be included as part of the regular rate of pay for overtime purposes.

"Section 350(e) of the Labor Code defines gratuity as follows:

> '(e) "Gratuity" includes any tip, gratuity, money or part thereof, which has been paid or given to or left for an employee by a patron of a business over and above the actual amount due such business for services rendered or for goods, food, drink, or articles sold or served to such patron.' (emphasis added)

"While it is true that certain patrons may believe that a service charge is a gratuity, the above definition makes it clear that under the Labor Code a mandatory service charge is not a gratuity. A service charge is clearly part of the amount due such business for services rendered or for goods, food or drink. Since the service charge is not over and above, but part of, the amount due, it cannot be a gratuity under the definition as written. Accordingly, Section 351, which makes gratuities the sole property of the employees for whom they are left, does not apply to service charges.

"Under Federal law, service charges are not considered tips or gratuities but are considered part of the gross receipts of the employer. Consequently, they may be used to satisfy the minimum wage obligations required by the FLSA and are included as part of the regular rate of pay for overtime purposes (See 29 Code of Federal Regulations (CFR), Section 531.55 [quoted in note 30] and Wage Hour Administrative Opinion 310 dated February 18, 1975).

"In light of the above and based on our previous experience before OAL with regard to the tip-pooling matter, it is clear to me that Policy & Procedure Memo 82-5 will be held to be an underground regulation by the Office of Administrative Law. The very detailed requirements and distribution ratio set forth in that memo can be found nowhere in applicable statutory law and, therefore, any argument that we are merely applying existing law in Policy & Procedure Memo 82-5

> will not prevail. Indeed, as noted above, Policy & Procedure Memo 82-5 is inconsistent with existing statutory law and, therefore, would not receive approval from OAL for promulgation through the regulatory process. . . .
>
> "Therefore, effective immediately, we shall return to the previous position of the Division prior to Policy & Procedure Memo 82-5. Service charges will not be considered gratuities, they will be considered part of the gross receipts of the employer and may be incorporated as part of the employer's wage obligation to the employees. They will, however, also be included as part of the regular rate of pay for the computation of overtime. . . ."
>
> [Emphasis in original.]

On August 4, 1989, the State Labor Commissioner wrote to OAL stating in part:

> "Enclosed for your review is Management Memo 89-2 which I recently issued. Management Memo 89-2 rescinds Policy & Procedure Memo 82-5. . . . Accordingly, I believe the proceeding in 89-005 is moot and should be dismissed." [Emphasis added.]

On August 31, 1989, the Requester wrote to OAL explaining why the relevant issues are not moot and asking OAL to issue a Determination in this matter.

II. ISSUES

Before turning to the dispositive issues of this Determination, we briefly address DLSE's contention that the Request for Determination should be dismissed because the recision of Memo 82-5 has rendered the matter moot. DLSE argues that OAL should not issue advisory opinions regarding policies that are neither in existence nor proposed to be in existence.[20]

We disagree that the issue of whether or not Memo 82-5 violated the requirements of the APA is moot. While Memo 82-5 has been rescinded, the validity of Memo 82-5 prior to the date of recision has not been adequately resolved. Employers who were required to distribute "service charges" to employees pursuant to Memo 82-5 have a right to a Determination of whether or not the Memo 82-5 was ever valid and enforceable.[21,22] Clearly, it is not up to DLSE to decide that the Determination is moot.

Moreover, like any other state agency, OAL is bound to follow its own regulations.[23] Section 126 of Title 1 of the

California Code of Regulations, adopted by OAL in 1985, states:

> "Within 75 days of the date of publication of the notice regarding the commencement of active consideration of the request for determination, the office shall issue a written determination as to whether the state agency rule is a regulation, along with the reasons supporting the determination." [Emphasis added.]

The language of section 126 mandates the issuance of a written determination following notice of active consideration of the Request for Determination.

We now proceed with our Determination by turning to the three main issues before us:[24]

(1) WHETHER THE APA IS GENERALLY APPLICABLE TO DLSE'S QUASI-LEGISLATIVE ENACTMENTS.

(2) WHETHER THE CHALLENGED RULE IS A "REGULATION" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.

(3) WHETHER THE CHALLENGED RULE FALLS WITHIN ANY ESTABLISHED EXCEPTION TO APA REQUIREMENTS.

FIRST, WE INQUIRE WHETHER THE APA IS APPLICABLE TO DLSE'S QUASI-LEGISLATIVE ENACTMENTS.

The APA applies to all state agencies, except those in the "judicial or legislative departments."[25] Since the Department of Industrial Relations (that is, DLSE) is in neither the judicial nor legislative branch of state government, we conclude that APA rulemaking requirements generally apply to that agency.[26]

Moreover, DLSE has conceded that regulations promulgated by the Labor Commissioner are subject to the requirements of the APA.[27,28]

SECOND, WE INQUIRE WHETHER THE CHALLENGED RULE IS A "REGULATION" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.

In part, Government Code section 11342, subdivision (b), defines "regulation" as:

> ". . . every rule, regulation, order, or standard of general application or the amendment, supplement or revision of any such rule, regulation,

> order or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, . . ." [Emphasis added.]

Government Code section 11347.5, authorizing OAL to determine whether or not agency rules are "regulations," provides in part:

> "(a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a [']regulation['] as defined in subdivision (b) of Section 11342, unless the guideline, criterion, bulletin, manual, instruction [or] . . . standard of general application . . . has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA] . . . ." [Emphasis added.]

Applying the definition of "regulation" found in Government Code section 11342, subdivision (b), involves a two-part inquiry:

First, is the challenged rule either

- a rule or standard of general application or
- a modification or supplement to such a rule?

Second, has the challenged rule been adopted by the agency to either

- implement, interpret, or make specific the law enforced or administered by the agency or
- govern the agency's procedure?

The answer to the first part of the inquiry is "yes." For an agency rule or standard to be "of general application" within the meaning of the APA, it need not apply to all citizens of the state. It is sufficient if the rule applies to all members of a class, kind or order.[29] Memo 82-5 states DLSE's policy with respect to the distribution of service charges. It's application is not limited to specifically named individuals or to any specific fact situation. Rather, Memo 82-5 has statewide application to all employers subject to the provisions of Labor Code sections 350 through 356.

The answer to the second part of the inquiry is also "yes." Here, our analysis is aided by the introduction to the challenged policy provisions. It indicates that the purpose of Memo 82-5 is "To clarify the treatment to be accorded service charges . . . pursuant to the provisions of Labor Code Sections 350, et. seq. [350-356], relating to 'gratuities' . . . ." Stated differently, the purpose of Memo 82-5 is to interpret, implement or make specific the law enforced or administered by DLSE.

The fundamental problem faced by DLSE in attempting to clarify the treatment of "service charges" under Labor Code sections 350 through 356 is that the statutes do not address the subject of how "service charges" are to be handled. OAL is aware of no California statute that governs this matter.[30] Thus, DLSE had to do more than to just "fill in the gaps" in the statutory scheme.

The provisions of Memo 82-5 create requirements and restrictions not contemplated by Labor Code sections 350 through 356.[31] Paragraph 1 of Memo 82-5 establishes guidelines for the division of "service charges" among employees and precludes from participation any employee having more than a five percent ownership interest in the establishment. Paragraph 2 creates a rebuttable presumption that the "service charge" in question is a "gratuity" when the employer fails to comply with paragraph 1. Paragraph 3 provides, in part, that "service charges" actually paid to an employee shall not be deemed to constitute part of that employee's regular rate of pay for purposes of computing any overtime pay.[32]

We conclude that Memo 82-5 is a "regulation" as defined in Government Code section 11342, subdivision (b).

THIRD, WE INQUIRE WHETHER THE CHALLENGED RULE FALLS WITHIN ANY ESTABLISHED EXCEPTION TO APA REQUIREMENTS.

Rules concerning certain activities of state agencies--for instance, "internal management"--are not subject to the procedural requirements of the APA.[33] However, none of the recognized exceptions apply to the provisions of Memo 82-5.

III. CONCLUSION

For the reasons set forth above, OAL finds that (1) rules issued by DLSE are generally required to be adopted pursuant to the APA; (2) DLSE's Memo 82-5 is a "regulation" as defined in Government Code section 11342, subdivision (b); (3) Memo 82-5 is not exempt from the requirements of the APA; and (4) therefore, Memo 82-5 violates Government Code section 11347.5, subdivision (a).

DATE: December 29, 1989

for HERBERT F. BOLZ
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1. The Requester, Richard J. Simmons, is an attorney with the law firm of Musick, Peeler & Garrett, at One Wilshire Blvd., Suite 2100, Los Angeles, CA 90017, (213) 629-7823. The State Labor Commissioner was represented by Joan E. Toigo, Staff Counsel, Division of Labor Standards Enforcement, at 525 Golden Gate Avenue, San Francisco, CA 94102, (415) 557-3827.

   To facilitate the indexing and compilation of determinations, OAL began, as of January 1, 1989, assigning consecutive page numbers to all determinations issued within each calendar year, e.g., the first page of this determination is "581" rather than "1."

2. The legal background of the regulatory determination process --including a survey of governing case law--is discussed at length in note 2 to 1986 OAL Determination No. 1 (Board of Chiropractic Examiners, April 9, 1986, Docket No. 85-001), California Administrative Notice Register 86, No. 16-Z, April 18, 1986, pp. B-14--B-16; typewritten version, notes pp. 1-4.

   In August 1989, a second survey of governing case law was published in 1989 OAL Determination No. 13 (Department of Rehabilitation, August 30, 1989, Docket No. 88-019), California Regulatory Notice Register 89, No. 37-Z, p. 2833, note 2. The second survey included (1) five cases decided after April 1986 and (2) seven pre-1986 cases discovered by OAL after April 1986. Persuasive authority was also provided in the form of nine opinions of the California Attorney General which addressed the question of whether certain material was subject to APA rulemaking requirements.

   Since then, the following authorities have come to light:

   > Los Angeles v. Los Olivas Mobile Home P. (1989) -- Cal.App.3d --, 262 Cal.Rptr. 446, 449 - citing Jones v. Tracy School Dist. (1980) 27 Cal.3d 99, 165 Cal.Rptr. 100 (a case in which an internal memorandum of the Department of Industrial Relations became involved) the Second District Court of Appeal refused to defer to the administrative interpretation of a rent stabilization ordinance by the city agency charged with its enforcement because the interpretation occurred in an internal memorandum rather than in an administrative regulation adopted after notice and hearing.

   Readers aware of additional judicial decisions concerning "underground regulations"--published or unpublished--are invited to furnish OAL's Regulatory Determinations Unit with a citation to the opinion and, if unpublished, a copy of the opinion. (Whenever a case is cited in a regulatory

determination, the citation is reflected in the Determinations Index.) Readers are also encouraged to submit citations to Attorney General opinions addressing APA compliance issues.

3. Government Code section 19572 provides:

"Each of the following constitutes cause for discipline of [a state] employee:

". . . .

"Unlawful retaliation against any other state officer or employee or member of the public who in good faith reports, discloses, divulges, or otherwise brings to the attention of, the Attorney General, or any other appropriate authority, any facts or information relative to actual or suspected violation of the law of this state or the United States occurring on the job or directly related thereto." [Emphasis added.]

4. Title 1, California Code of Regulations ("CCR") (formerly known as California Administrative Code), section 121, subsection (a), provides:

"'Determination' means a finding by [OAL] as to whether a state agency rule is a regulation, as defined in Government Code section 11342, subdivision (b), which is invalid and unenforceable unless it has been adopted as a regulation and filed with the Secretary of State in accordance with the [APA] or unless it has been exempted by statute from the requirements of the [APA]." [Emphasis added.]

See Planned Parenthood Affiliates of California v. Swoap (1985) 173 Cal.App.3d 1187, 1195, n. 11, 219 Cal.Rptr. 664, 673, n. 11 (citing Gov. Code sec. 11347.5 in support of finding that uncodified agency rule which constituted a "regulation" under Gov. Code sec. 11342, subd. (b), yet had not been adopted pursuant to the APA, was "invalid").

5. Government Code section 11347.5 provides:

"(a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a [']regulation['] as defined in subdivision (b) of Section 11342, unless the guideline, criterion, bulletin,

manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter.

"(b) If the office is notified of, or on its own, learns of the issuance, enforcement of, or use of, an agency guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which has not been adopted as a regulation and filed with the Secretary of State pursuant to this chapter, the office may issue a determination as to whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, is a [']regulation['] as defined in subdivision (b) of Section 11342.

"(c) The office shall do all of the following:

1. File its determination upon issuance with the Secretary of State.

2. Make its determination known to the agency, the Governor, and the Legislature.

3. Publish a summary of its determination in the California Regulatory Notice Register within 15 days of the date of issuance.

4. Make its determination available to the public and the courts.

"(d) Any interested person may obtain judicial review of a given determination by filing a written petition requesting that the determination of the office be modified or set aside. A petition shall be filed with the court within 30 days of the date the determination is published.

"(e) A determination issued by the office pursuant to this section shall not be considered by a court, or by an administrative agency in an adjudicatory proceeding if all of the following occurs:

1. The court or administrative agency proceeding involves the party that sought the determination from the office.

2. The proceeding began prior to the party's request for the office's determination.

3. At issue in the proceeding is the question of whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which is the legal basis for the adjudicatory action is a [']regulation['] as defined in subdivision (b) of Section 11342."

[Emphasis added.]

6. As we have indicated elsewhere, an OAL determination pursuant to Government Code section 11347.5 is entitled to great weight in both judicial and adjudicatory administrative proceedings. See 1986 OAL Determination No. 3 (Board of Equalization, May 28, 1986, Docket No. 85-004), California Administrative Notice Register 86, No. 24-Z, June 13, 1986, p. B-22; typewritten version, pp. 7-8; Culligan Water Conditioning of Bellflower, Inc. v. State Board of Equalization (1976) 17 Cal.3d 86, 94, 130 Cal.Rptr. 321, 324-325 (interpretation of statute by agency charged with its enforcement is entitled to great weight). The Legislature's special concern that OAL determinations be given appropriate weight in other proceedings is evidenced by the directive contained in Government Code section 11347.5, subdivision (c): "The office shall . . . [m]ake its determination available to . . . the courts." (Emphasis added.)

7. Note Concerning Comments and Responses

In general, in order to obtain full presentation of contrasting viewpoints, we encourage not only affected rulemaking agencies but also all interested parties to submit written comments on pending requests for regulatory determination. (See Title 1, CCR, sections 124 and 125.) The comment submitted by the affected agency is referred to as the "Response." If the affected agency concludes that part or all of the challenged rule is in fact an "underground regulation," it would be helpful, if circumstances permit, for the agency to concede that point and to permit OAL to devote its resources to analysis of truly contested issues.

On June 9, 1989, after OAL's acceptance of the request for determination, DLSE issued "Management Memo 89-2" rescinding "Policy and Procedure Memo 82-5." By letter dated August 4, 1989, DLSE provided OAL with a copy of Memo 89-2 and requested dismissal of the determination. On August 31, 1989, the Requester wrote to OAL explaining why OAL should

proceed with the determination. On October 6, 1989, DLSE submitted its Response to the request for determination.

All of the above-noted correspondence and submitted items were considered in rendering this determination.

8. If an uncodified agency rule is found to violate Government Code section 11347.5, subdivision (a), the rule in question may be validated by formal adoption "as a regulation" (Government Code section 11347.5, subd. (b)) or by incorporation in a statutory or constitutional provision. See also California Coastal Commission v. Quanta Investment Corporation (1980) 113 Cal.App.3d 579, 170 Cal.Rptr. 263 (appellate court authoritatively construed statute, validating challenged agency interpretation of statute.)

9. Pursuant to Title 1, CCR, section 127, this Determination shall become effective on the 30th day after filing with the Secretary of State. This Determination was filed with the Secretary of State on the date shown on the first page of this Determination.

10. We refer to the portion of the APA which concerns rulemaking by state agencies: Chapter 3.5 of Part 1 ("Office of Administrative Law") of Division 3 of Title 2 of the Government Code, sections 11340 through 11356.

The rulemaking portion of the APA and all OAL Title 1 regulations are both reprinted and indexed in the annual APA/OAL regulations booklet, which is available from OAL's Information Services Unit for $3.00.

11. Stats. 1976, ch. 746, secs. 16, 17.

12. Labor Code sections 21; 79; 82, subdivision (b); and 83, subdivision (b).

13. Labor Code section 61.

14. We discuss the affected agency's rulemaking authority (see Gov. Code, sec. 11349, subd. (b)) in the context of reviewing a Request for Determination for the purposes of exploring the context of the dispute and of attempting to ascertain whether or not the agency's rulemaking statute expressly requires APA compliance. If the affected agency should later elect to submit for OAL review a regulation

proposed for inclusion in the California Code of Regulations, OAL will, pursuant to Government Code section 11349.1, subdivision (a), review the proposed regulation in light of the APA's procedural and substantive requirements.

The APA requires all proposed regulations to meet the six substantive standards of Necessity, Authority, Clarity, Consistency, Reference, and Nonduplication. OAL does not review alleged "underground regulations" to determine whether or not they meet the six substantive standards applicable to regulations proposed for formal adoption.

The question of whether the challenged rule would pass muster under the six substantive standards need not be decided until such a regulatory filing is submitted to us under Government Code section 11349.1, subdivision (a). At that time, the filing will be carefully reviewed to ensure that it fully complies with all applicable legal requirements.

Comments from the public are very helpful to us in our review of proposed regulations. We encourage any person who detects any sort of legal deficiency in a proposed regulation to file comments with the rulemaking agency during the 45-day public comment period. (Only persons who have formally requested notice of proposed regulatory actions from a specific rulemaking agency will be mailed copies of that specific agency's rulemaking notices.) Such public comments may lead the rulemaking agency to modify the proposed regulation.

If review of a duly-filed public comment leads us to conclude that a regulation submitted to OAL does not in fact satisfy an APA requirement, OAL will disapprove the regulation. (Gov. Code, sec. 11349.1.)

15. Labor Code section 55 grants the director of the Department of Industrial Relations ("department") general rulemaking authority. Section 55 provides in part that:

> ". . . Notwithstanding any provision in this code to the contrary, the director may require any division in the department to assist in the enforcement of any or all laws within the jurisdiction of the department. . . .[T]he director may, in accordance with the [APA], make such rules and regulations as are reasonably necessary to carry out the provisions of this chapter [sections 50-64] and to effectuate its purposes." [Emphasis added.]

Labor Code section 56 provides:

> "The work of the department shall be divided into at least six divisions [one is] known as . . . the Division of Labor Standards Enforcement, ..."

Labor Code section 59 provides:

> "The department through its appropriate officers shall administer and enforce all laws imposing any duty, power, or function upon the offices or officers of the department." [Emphasis added.]

Labor Code section 61 provides:

> "The provisions of Chapter 1 [Wages, Hours and Working Conditions] (commencing with Section 1171) of Part 4 of Division 2 shall be administered and enforced by the department through the Division of Labor Standards Enforcement."

Labor Code section 355 provides:

> "The Department of Industrial Relations shall enforce the provisions of this article [sections 350-356, "Gratuities"]. . .."

(The matter at hand concerns interpretation of Division 2, Chapter 3, Article 1 ("Gratuities"), sections 350 through 356 of the Labor Code. Presumably, this enforcement responsibility has been delegated to DLSE.)

16. Prior Law: Stats. 1929, ch. 891, secs. 1-5, p. 1972.

17. Stats. 1975, ch. 324, sec. 1.

18. The copy of Memo 82-5 provided by the Requester is of poor quality. To the best of our knowledge, the quoted text represents the whole of Memo 82-5.

19. Memo 89-2 indicates that Memo 82-5 was issued on July 15, 1982 and amended on November 29, 1982. It is the amended version of Memo 82-5 which has been challenged.

20. DLSE argues that OAL's issuance of a Determination in this instance would be in direct conflict with OAL's legislatively-mandated purpose. To support that position, DLSE cites, in part, to the preface to OAL's 1989 APA booklet, which states:

> "California's regulatory process provides opportunities for private individuals to make sure all the regulations they must comply with are authorized, make sense and do not create unnecessary red tape."

DLSE contends that proceeding on with a Determination regarding a policy that has been rescinded violates OAL's purpose as such action constitutes "unnecessary red tape." We disagree.

The phrase "unnecessary red tape" was clearly not written to address actions taken by OAL in response to a Request for Determination. Instead, the phrase merely reflects the public's opportunity to question the "necessity" of proposed regulations.

The more relevant portion of the preface to OAL's 1989 APA booklet reads:

> ". . . (OAL) protects the public from overregulation and from illegal enforcement of unauthorized regulations. [Emphasis added.]

21. DLSE argues that the effects of the "alleged 'violation'" are mitigated by the fact that all claims that are pending before DLSE at the time it issued its Response shall be decided according to the revised policy. That pledge, however, does not account for all situations in which an employer was required to distribute collected "service charges" prior to the recision of Memo 82-5. According to the Requester, "Claims based on the DLSE's 1982 rule have been paid, settled or otherwise resolved based on an underground policy that was applied by DLSE as a rule of law." (Letter, August 31, 1989, p. 3.)

22. DLSE's assessment of Memo 82-5 is not entirely consistent. On one hand, DLSE concedes that Memo 82-5 was inconsistent with existing law and rescinded because it was not in compliance with the APA. On the other hand, DLSE refers to "mitigating the effects of the alleged 'violation'." Throughout its Response, DLSE described Memo 82-5 as a mere "aberration of the Division's policy."

Moreover, it is not DLSE's role to find whether or not its policy memo violated the requirements of the APA; it is ours. The Requester has shown great concern that absent a Determination by OAL, DLSE is free to again change its stance--i.e., readopt the policy announced in Memo 82-5, regardless of what it has conceded. DLSE's answer to that claim is that, "Any attempt to, again, reverse the Division's position would be patently inconsistent with statutory law, as well as with the APA procedure and

therefore, be highly improbable." [Emphasis added.] Regardless of the probability of occurrence, this Determination would foreclose any question regarding the validity of such action.

23. "It is by now axiomatic that agencies must comply with their own regulations while they remain in effect. [Citations.]" (Memorial, Inc. v. Harris (9th Cir. 1980) 655 F.2d 905, 910, n. 14.)

24. See Faulkner v. California Toll Bridge Authority (1953) 40 Cal.2d 317, 324 (point 1); Winzler & Kelly v. Department of Industrial Relations (1981) 121 Cal.App.3d 120, 174 Cal.Rptr. 744 (points 1 and 2); and cases cited in note 2 of 1986 OAL Determination No. 1. A complete reference to this earlier Determination may be found in note 2 to today's Determination.

25. Government Code section 11342, subdivision (a). See Government Code sections 11343, 11346 and 11347.5. See also Auto and Trailer Parks, 27 Ops.Cal.Atty.Gen. 56, 59 (1956). For a complete discussion of the rationale for the "APA applies to all agencies" principle, see 1989 OAL Determination No. 4 (San Francisco Regional Water Quality Control Board and the State Water Resources Control Board, March 29, 1989, Docket No. 88-006), California Regulatory Notice Register 89, No. 16-Z, April 21, 1989, pp. 1026, 1051-1062; typewritten version, pp. 117-128.

26. See Winzler & Kelly v. Department of Industrial Relations (1981) 121 Cal.App.3d 120, 126-128, 174 Cal.Rptr. 744, 746-747 (unless "expressly" or "specifically" exempted, all state agencies not in legislative or judicial branch must comply with rulemaking part of APA when engaged in quasi-legislative activities); Poschman v. Dumke (1973) 31 Cal.App.3d 932, 943, 107 Cal.Rptr. 596, 603.

27. 1988 OAL Determination No. 9 (Department of Industrial Relations, June 9, 1988, Docket No. 87-015), CRNR, 88, No. 26-Z, June 24, 1988, p. 2160.

28. DLSE's "Management Memo 89-2," which states, "Procedure Memo 82-5 is inconsistent with existing statutory law and, therefore, would not receive approval from OAL for promulgation through the regulatory process" reflects DLSE's recognition of the need to comply with APA rulemaking requirements. Further evidence of DLSE's admission no this point is contained in its Response, which states at note 1,

". . . the current Labor Commissioner . . . [rescinded] a policy not in compliance with the APA . . . ."

29. Roth v. Department of Veteran Affairs (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552.

30. A federal regulation has been adopted to resolve the handling of "service charges." Section 531.55 ("Examples of amounts not received as tips") of Part 351 of Volume 29 of the Code of Federal Regulations states:

> "(a) A compulsory charge for service, such as 10 percent of the amount of the bill, imposed on a customer by an employer's establishment, is not a tip and, even if distributed by the employer to his employees, cannot be counted as a tip received . . . . Similarly, where negotiations between a hotel and a customer for banquet facilities include amounts for distribution to employees of the hotel, the amounts so distributed are not counted as tips received. Likewise, where the employment agreement is such that amounts presented by customers as tips belong to the employer and must be credited or turned over to him, the employee is in effect collecting for his employer additional income from the operations of the latter's establishment. Even though such amounts are not collected by imposition of any compulsory charge on the customer, plainly the employee is not receiving tips . . . . The amounts received from customers are the employer's property, not his, and do not constitute tip income to the employee.
>
> (b) As stated above, service charges and other similar sums which become part of the employer's gross receipts are not tips for the purposes of the [Fair Labor Standards] Act. However, where such sums are distributed by the employer to his employees, they may be used in their entirety to satisfy the monetary requirements of the Act. Also, if pursuant to an employment agreement the tips received by an employee must be credited or turned over to the employer, such sums may, after receipt by the employer, be used by the employer to satisfy the monetary requirements of the Act. . . . ." [Emphasis added.]

31. Both DLSE and the Requester point out that portions of Memo 82-5 are inconsistent with existing law. As Memo 82-5 has not been submitted to OAL for review as a regulatory filing pursuant to Government Code section 11349.1, subdivision (a), we need not make a finding with respect to the APA

substantive standard of "Consistency" at this time. (See also note 14.)

32. Paragraphs 4 and 5 of Memo 82-5 specify the conditions under which paragraphs 1 and 2 shall not apply. Paragraph 6 of Memo 82-5 simply declares the effective date of the memo.

33. The following provisions of law may permit rulemaking agencies to avoid the APA's requirements under some circumstances:

    a. Rules relating only to the internal management of the state agency. (Gov. Code, sec. 11342, subd. (b).)

    b. Forms prescribed by a state agency or any instructions relating to the use of the form, except where a regulation is required to implement the law under which the form is issued. (Gov. Code, sec. 11342, subd. (b).)

    c. Rules that "[establish] or [fix] rates, prices, or tariffs." (Gov. Code, sec. 11343, subd. (a)(1).)

    d. Rules directed to a specifically named person or group of persons and which do not apply generally throughout the state. (Gov. Code, sec. 11343, subd. (a)(3).)

    e. Legal rulings of counsel issued by the Franchise Tax Board or the State Board of Equalization. (Gov. Code, sec. 11342, subd. (b).)

    f. There is limited authority for the proposition that contractual provisions previously agreed to by the complaining party may be exempt from the APA. City of San Joaquin v. State Board of Equalization (1970) 9 Cal.App.3d 365, 376, 88 Cal.Rptr. 12, 20 (sales tax allocation method was part of a contract which plaintiff had signed without protest); see Roth v. Department of Veterans Affairs (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552 (dictum); Nadler v. California Veterans Board (1984) 152 Cal.App.3d 707, 719, 199 Cal.Rptr. 546, 553 (same); but see Government Code section 11346 (no provision for non-statutory exceptions to APA requirements); see International Association of Fire Fighters v. City of San Leandro (1986) 181

Cal.App.3d 179, 182, 226 Cal.Rptr. 238, 240 (contracting party not estopped from challenging legality of "void and unenforceable" contract provision to which party had previously agreed); see Perdue v. Crocker National Bank (1985) 38 Cal.3d 913, 926, 216 Cal.Rptr. 345, 353 ("contract of adhesion" will be denied enforcement if deemed unduly oppressive or unconscionable).

The above is not intended as an exhaustive list of possible APA exceptions. Further information concerning general APA exceptions is contained in a number of previously issued OAL determinations. The quarterly Index of OAL Regulatory Determinations is a helpful guide for locating such information. (See "Administrative Procedure Act" entry, "Exceptions to APA requirements" subheading.)

The Determinations Index, as well as an order form for purchasing copies of individual determinations, is available from OAL (Attn: Tande' Montez), 555 Capitol Mall, Suite 1290, Sacramento, CA 95814, (916) 323-6225, ATSS 8-473-6225. The price of the latest version of the Index is available upon request. Also, regulatory determinations are published every two weeks in the California Regulatory Notice Register, which is available from OAL at an annual subscription rate of $108.

Though the quarterly Determinations Index is not published in the Notice Register, OAL accepts standing orders for Index updates. If a standing order is submitted, OAL will periodically mail out Index updates with an invoice.

34. We wish to acknowledge the substantial contribution of Senior Legal Typist Tande' Montez in the processing of this Request and in the preparation of this Determination.